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No. 85-767

In The

Supreme Court of the United States

October Term, 1985

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, NORTH CAROLINA BOARD OF TRANSPORTATION, and JAMES E. HARRINGTON, as Secretary of the North Carolina Department of Transportation and Chairman of the North Carolina Board of Transportation,

Petitioners,

v.

CREST STREET COMMUNITY COUNCIL, INC., RESIDENTS OF CREST STREET COMMUNITY, and SAVE OUR CHURCH and COMMUNITY COMMITTEE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS

BRIEF OF RESPONDENTS IN OPPOSITION

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STATEMENT OF THE CASE

Petitioners, in their statement of the case, omit many of the findings of fact joined in by both the Court of Appeals and the District Court and they do not explain the context of the two courts' decisions, vis-a-vis this court's recent decision in *Webb v. Board of Education of Dyer County*, 471 U.S. —, 105 S. Ct. 1923, 85 L.Ed. 2d 233, (1985). These findings and the context of these decisions help explain the actions of the courts below and also help show why granting certiorari is inappropriate in this case. Therefore, they are set out as follows.[1]

Respondents, the prevailing parties in a federal administrative proceeding under Title VI of the Civil Rights Act of 1964 and in a related federal court action, filed a claim under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. Section 1988, to recover attorneys fees and expenses. Respondents are civic and church organizations representing the Crest Street Community, a long-established, cohesive, black neighborhood in Durham, North Carolina.[2] For many years petitioner North Carolina Department of Transportation (NCDOT) proposed

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1. Except where noted otherwise, the following statement of the case is taken from the findings of the courts below, reprinted in Petitioners' Appendix, pp. 1-40.

2. The Residents of Crest Street Community and the Save Our Church and Community Committee are unincorporated associations representing the interests of the residents of the Crest Street Community and the New Bethel Missionary Baptist Church, which is located within the Crest Street Community. In 1980 the Crest Street Community Council, Inc. was incorporated and assumed the functions of these two associations. Other than this affiliation, there are no parent companies, subsidiaries or affiliates of the Crest Street Community Council, Inc.

extending a freeway through the Crest Street Community with a major interchange in the midst of the community.[3] The proposed extension was a federal-aid highway project with 75% of the costs to be paid by federal funds. As proposed, extension of the freeway would destroy the Crest Street Community. The freeway right of way would displace the community church and park and more than half of the residents. The remaining residents would be isolated in fragments likely to be quickly consumed by commercial development.

For several years plans for the extension remained dormant; then, in 1976, NCDOT resumed active planning for the project. In March 1977, respondents retained the North Central Legal Assistance Program to represent them concerning NCDOT's planning and construction of the freeway and remedial efforts to mitigate the adverse impact of the project.[4] Respondents, during 1977 and 1978, expressed their opposition to construction of the freeway through the Crest Street Community, but petitioners proceeded with issuing a revised draft Environmental Impact Statement for the project.

After NCDOT issued this revised draft Environmental Impact Statement, respondents, in September 1978, filed an administrative complaint with the United States Department of Transportation (USDOT), pursuant to USDOT's Title VI regulations, 49 CFR 21 *et seq.* The

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3. The other petitioners are the governing board and official of the North Carolina Department of Transportation.

4. The North Central Legal Assistance Program, a nonprofit corporation which is funded by the Legal Services Corporation, provides legal representation to low-income persons.

complaint alleged that NCDOT's actions violated Title VI and sought rejection of NCDOT's revised Environmental Impact Statement and prohibition of further planning on the project until NCDOT complied with Title VI.[5]

USDOT investigated the administrative complaint, including a week-long field investigation, meetings with NCDOT's staff and with respondents, and the receipt of extensive documents from NCDOT and respondents. On February 20, 1980, USDOT notified the Secretary of NCDOT that USDOT had made a preliminary finding of reasonable cause that construction of the freeway as proposed in NCDOT's revised draft Environmental Impact Statement would constitute a prima facie violation of Title VI and USDOT Title VI regulations.[6]

Title VI requires that attempts be made to mediate a complaint before other enforcement measures can be instituted; "no such action [cutting off federal funding] shall be taken until the department or agency concerned

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5. The primary claims in the complaint were under Title VI. The complaint also challenged the project under the National Environmental Policy Act, 42 U.S.C. Section 4331, the Federal-Aid Highway Act, 23 U.S.C. Section 109 and Title VIII of the Civil Rights Act of 1968 (fair housing), 42 U.S.C. Section 3601.

6. The specific USDOT Title VI regulation, 49 C.F.R. Section 21.5(b)(3), provides:

"In determining the site or location of facilities, a recipient or applicant may not make selections with the purpose or effect of excluding persons from, denying them the benefits of, or subjecting them to discrimination under any program to which this regulation applies, on the grounds of race, color, or national origin, or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act or this part."

has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means." 42 U.S.C. Section 2000d-1.[7] Accordingly, USDOT urged NCDOT and respondents to attempt to mediate the issues raised by the administrative complaint. Prolonged, extensive negotiations followed between respondents and petitioners with involvement by representatives from USDOT, the Federal Highway Administration and other entities interested in the freeway. In February 1982, respondents, NCDOT and the City of Durham reached a preliminary agreement on resolution of the administrative complaint and negotiations continued toward a final agreement.

While negotiations continued, NCDOT moved, in August 1982, to dissolve an order enjoining construction of the freeway, entered in *ECOS, Inc., et al v. Brinegar, et al*, No. C-352-D-72 (M.D.N.C. Feb. 20, 1973).[8] Respondents and Willie Patterson, a Crest Street Community resident, moved to intervene in the *ECOS* action and filed a proposed complaint alleging the Title VI violations and other allegations raised in the administrative complaint.

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7. USDOT's Title VI regulations implement this requirement at 49 CFR Sections 21.11(d)(1) and 21.13(a).

8. In the *ECOS* action several organizations and individuals challenged construction of part of the freeway, including the portion proposed through the Crest Street Community, alleging violations of the Federal-Aid Highway Act, 24 U.S.C. Section 128, 138, 49 U.S.C. Section 1653 (f) (parkland preservation) and the National Environmental Policy Act of 1969, 42 U.S.C. Section 4332. NCDOT was enjoined from taking steps toward construction of this section of the freeway until NCDOT complied with these statutes.

While respondents' motion for intervention was pending, the parties agreed upon a Final Mitigation Plan and the City of Durham and NCDOT agreed upon a Municipal Agreement setting out the respective duties of NCDOT and the city in implementing the Mitigation Plan.

The Final Mitigation Plan recites that respondents agreed to withdraw their administrative complaint and support dissolution of the *ECOS* injunction in exchange for NCDOT's and the city's agreement to implement the Final Mitigation Plan.

On December 14, 1982 the district court entered a consent judgment in the *ECOS* action. The judgment dissolved the injunction, dismissed the action and dismissed, with prejudice, respondents' claims, conditional on NCDOT's implementing the Final Mitigation Plan.[9] The following day formal execution of the Final Mitigation Plan and Municipal Agreement took place at a public ceremony.

Under the terms of the Final Mitigation Plan, the respondents were accorded substantial relief. First, a new community site was developed in the same area as the existing community, allowing the residents to remain intact as

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9. Petitioners assert in their statement of the case that "Respondent Crest Street Community Council and the individual were not allowed to intervene." Petition at p. 4. This assertion is incorrect. The district court did not specifically rule on the intervention motion. The intervenors, though, became parties by virtue of the consent judgment, which both petitioners and respondents signed. The consent judgment adjudicated the claims between petitioners and respondents, dismissing with prejudice respondents' Title VI and other claims, conditioned upon petitioners' Implementation of the Final Mitigation Plan. Respondents' Appendix pages 1-5.

a community. Second, the petitioners moved the right-of-way for the freeway and modified the design of the interchange in the Crest Street Community so as to eliminate the taking of the community church and park. These modifications also provided available land for the new community site. In the new community housing, streets and recreational facilities are dramatically improved over the conditions in the old community. Much of the relief accorded to plaintiffs was provided by the petitioners. The North Carolina Department of Transportation released the City of Durham from its obligation to pay an estimated 2.75 million dollars for right-of-way costs for the Freeway, on the condition that the City use these and additional funds in the mitigation efforts. In addition, the North Carolina Department of Transportation provided direct benefits to the community, above and beyond regular relocation benefits, at an estimated cost of several million dollars.

Both the Final Mitigation Plan and the *ECOS* Consent Judgment specifically reserved respondents' claim for attorney's fees. Plaintiffs subsequently submitted to defendants a request for payment of attorney's fees, accompanied by the detailed listing of expenses and hours. This request was summarily denied by petitioners and respondents filed this action on November 30, 1983 to recover the requested attorney's fees and expenses.[10] The action came before the district court on cross motions for summary

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10. The petitioners' petition did not contain the statement of basis for federal jurisdiction in the court of first instance, required by Supreme Court Rule 21(1). The district court had jurisdiction of this action pursuant to 28 U.S.C. Section 1331 (federal question).

judgment.[11] On November 29, 1984 the district court granted petitioners' motion and dismissed the action. 598 F. Supp. 258 (M.D.N.C. 1984). The district court noted that there was no controlling Supreme Court or Fourth Circuit case on the issue, that the other circuits had divided on the issue, and that the issue was "difficult." *Id.*, at 266-7. The district court denied respondents' claim for fees for the Title VI federal administrative proceeding because the court concluded that Section 1988 did not authorize fees for such proceedings. The district court also denied respondents' claim for fees for the *ECOS* action because the court concluded that respondents were not prevailing parties in that litigation.[12]

Respondents appealed and while the case was pending before the Court of Appeals, this Court issued its decision in *Webb*. The Court of Appeals, applying the *Webb* decision, found that respondents' claim for attorneys fees was explicitly authorized by Section 1988 and the court remanded the action to the district court for a determination of the amount of the attorney's fees. 769 F.2d 1025 (4th Cir. 1985). The unanimous Court of Appeals opinion

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11. Petitioners filed a motion to dismiss, which the district court treated as a motion for summary judgment.

12. The district court reached this conclusion notwithstanding that petitioners had never contended that respondents were not prevailing parties in the *ECOS* action. The petitioners' motion to dismiss raised only the following defenses: lack of jurisdiction; Eleventh Amendment immunity; failure to state a claim; lack of standing; and failure to exhaust administrative remedies. Respondents' Appendix, pp. 7-8.

was authored by Chief Judge Winter and the panel included Judges appointed in each of the last three decades.[13]

The petitioners applied to the Court of Appeals for a stay of the mandate pending their petition for certiorari to this Court. The Court of Appeals denied the motion for a stay and issued the mandate. Respondents' Appendix, p. 3. The case is currently before the district court for a determination of the amount of the fees.

SUMMARY OF REASONS FOR DENYING THE WRIT

Petitioners request a writ of certiorari on two grounds. First, they contend that the decision of the Court of Appeals is in conflict with the recent *Webb* decision of this Court, *Webb v. Board of Education of Dyer County,* 471 U. S. —, 85 L.Ed.2d 233, 105 S.Ct. 1923 (1985). As will be shown below, however, the Court of Appeals' decision is entirely consistent with this Court's ruling in the *Webb* case and is in fact strongly supported by *Webb*. Second, petitioners, citing a number of cases dealing with the application of Section 1988 to administrative proceedings, assert that this Court should resolve the conflict in these cases. It will be shown below that, in fact, the *Webb* decision effectively resolved the conflict among the different decisions issued prior to *Webb* and there is no conflict among the subsequent decisions applying *Webb* to administrative proceedings. In addition, there has not been sufficient time for the lower courts to apply *Webb* and thus the issue of the application of Section 1988 to administrative proceedings is not yet ripe for further consideration by this Court.

13. Chief Judge Harrison L. Winter, appointed June 24, 1966; Judge H. Emory Widener, Jr., appointed October 17, 1972; and Robert F. Chapman, appointed October 2, 1981.

ARGUMENT

I. The Court of Appeals Correctly Applied the Webb Decision in this Case.

The *Webb* case was the third major Supreme Court case delineating the circumstances under which prevailing civil rights parties can recover attorney's fees for representation in administrative proceedings, the two previous cases being *New York Gaslight Club, Inc. v. Carey,* 447 U.S. 54, 100 S.Ct. 2024, 64 L.Ed. 2d 723 (1980) and *Smith v. Robinson,* 468 U.S. —, 104 S.Ct. 3457, 82 L.Ed.2d 746 (1984). In all three of these cases this Court has applied the relevant statutory language as it was enacted by Congress and has rejected attempts to either expand or contract the coverage of the statute. In the instant case the Court of Appeals correctly followed this same approach and applied the statutory language of Section 1988 in determining that respondents are entitled to recover their attorney's fees.

In the first Supreme Court case, *Carey,* a prevailing plaintiff under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e *et seq.,* sought attorney's fees for representation in a state administrative proceeding, which was established pursuant to Title VII. The attorney's fee provision for Title VII, Section 706(k), upon which Section 1988 was closely patterned, has the exact same lan-

guage of "any action or proceeding."[14] The defendant contended that the plaintiff could recover attorney's fees only for representation in court litigation and not for representation in an administrative proceeding, arguing that the word "proceedings" in Section 706(k) should be limited to court proceedings. This Court rejected that argument, stating:

> The words of Section 706(k) leave little doubt that fee awards are authorized for legal work done in "proceedings" other than court actions. Congress' use of the broadly inclusive disjunctive phrase "action or proceeding" indicates an intent to subject the losing party to an award of attorney's fees and costs that included expenses incurred for administrative proceedings.

100 S.Ct. at 2029.

In *Smith,* the second major Supreme Court case, a prevailing plaintiff sought attorney's fees under Section 1988 for state administrative proceedings pursuant to the Education of the Handicapped Act (EHA), 20 U.S.C. Section 1400 *et seq.* The state administrative proceeding in question was mandatory before a federal court action could be initiated. However, the proceedings were mandated by EHA, a non-fee statute, and not by one of the statutes listed in Section 1988. This Court again applied the attorney's fee provision literally, denying fees for the EHA proceeding because such proceedings were not proceedings to enforce one of the statutes ennumerated in Section 1988.

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14. Section 706(k) provides:

In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs. 42 U.S.C. Section 2000e-5(k).

Most recently, in the *Webb* case, this Court again applied the attorney's fee provision of Section 1988 as written and rejected an attempt to construe the statute in a manner contrary to its actual language. In *Webb* the plaintiff sought to recover attorneys fees for a state administrative proceeding that was a precursor to a Section 1983 federal court action. This Court rejected the claim, finding, as it did in *Smith,* that the state administrative action was not a proceeding to enforce one of the statutes enumerated in Section 1988. The Court concluded that fees for work performed in such administrative proceedings would be allowed only if the work "was both useful and of a type ordinarily necessary to advance the . . . litigation" of an action to enforce one of the statutes enumerated in Section 1988. 105 S.Ct. at 1925. In rejecting the plaintiff's attempt to expand the coverage of Section 1988 beyond its actual language, this Court also declined to adopt the defendant's argument to reduce the coverage of the statutory language of Section 1988. Defendants in *Webb,* like the *Carey* defendants, argued that the word "proceedings" in Section 1988 did not encompass administrative proceedings.[15] If the Court had adopted this limiting interpretation of the statute it would have easily disposed of the plaintiff's claim. The Court instead continued the approach exhibited in the *Carey* and *Smith* cases and applied the statute as it was written.[16]

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15. *Webb,* 103 S. Ct. at 1931. (Brennan, J., concurring in part and dissenting in part).

16. This Court has previously noted that generally the actual language of the statute should be followed: "[a]bsent a clearly expressed legislative intention to the contrary, [the]

(Continued on following page)

The Court of Appeals in the instant case followed this same approach for applying Section 1988. Section 1988, in pertinent part, provides:

> In any action or proceeding to enforce the provisions of sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

The Court of Appeals found: "that the wording of Section 1988 explicitly covers plaintiffs' claim: They were 'prevailing parties' in a 'proceeding to enforce . . . title VI of the Civil Rights Act of 1964.'" 769 F.2d at —; Petitioners' Appendix at 8. Petitioners nevertheless contend that the Court of Appeals decision is inconsistent with *Webb* because: "Although *Webb* does not construe the language of Section 1988 to mean administrative proceedings were not intended, it does appear to construe the legislative history as intending court actions rather than administrative actions . . . ." Petition at p. 8. This Court in *Webb* found that the legislative history of Section 1988 did not provide justification to expand the coverage of

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language [of] the statute must ordinarily be regarded as conclusive." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 106 S.Ct. 2051, 64 L.Ed.2d 766 (1980), at 108. Regarding the issue of when attorney's fees are to be awarded, the Court has suggested that special deference be given to the statutory language enacted by Congress: "it is apparent that the circumstances under which attorney's fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine." (footnote omitted) *Alyeska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240, at 240, 95 S. Ct. 1612, 44 L.Ed.2d 141 (1975), at 262.

Section 1988 to administrative proceedings not specifically provided for in the statute. This case presents a different issue. Petitioners seek to exclude from the coverage of Section 1988 proceedings that *are* specifically provided for in the statute. Moreover, as the Court of Appeals below found, the legislative history of Section 1988 supports, rather than argues against, awarding attorney's fees to parties such as respondents, who have prevailed in Title VI federal administrative proceedings.[17]

In sum, the holding and the analytical approach of the Court of Appeals are entirely consistent with, if not mandated by, this Court's *Webb* decision.

II. The Webb Decision Resolved the Conflict in Pre-Webb Cases and There is No Conflict in Post-Webb Decisions on the Application of Section 1988 to Administrative Proceedings.

Petitioners cite numerous cases on the issue of the application of Section 1988 to administrative proceedings and ask this Court to grant certiorari to resolve the conflicts in these cases. The *Webb* decision, however, has already effectively resolved the conflicts. The majority of the pre-*Webb* cases cited are explicitly covered by the *Webb* ruling and in the remaining pre-*Webb* cases the rea-

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17. The court concluded:

> Certainly there is no affirmative indication that Congress meant to nullify the term "proceeding" that it used in Section 1988. To the contrary, we believe that the expressed purposes "to remedy anomalous gaps in our civil rights laws . . . and to achieve consistency in our civil rights laws," Senate Report, supra note 13, at 1, the explicit references to Title VII, *id*, at 2, 3, 4, and the renewed instruction to "the courts to use the broadest and most effective remedies available to achieve the goals of our civil rights laws," *id* at 3, all support our conclusion. 769 F.2d at —; Petitioners' Appendix at 13.

soning of the *Webb* opinion settles the conflict. Regarding the few post-*Webb* decisions, there is no conflict at all in the decisions of the various courts in their application of *Webb* to administrative proceedings.

Most of the decisions cited by petitioners are pre-*Webb* cases which involve state proceedings which were not proceedings to enforce one of the statutes listed in Section 1988: *Blow v. Lascaris,* 668 F.2d 670 (2nd Cir. 1980), *cert. denied* 459 U.S. 914, 103 S.Ct. 225, 74 L.Ed.2d 179 (1982) (state administrative medicaid proceeding); *Horacek v. Thone,* 710 F.2d 496 (8th Cir. 1983) (state administrative proceeding established pursuant to a consent decree); *Redd v. Lambert,* 674 F.2d 1032 (5th Cir. 1982) (state court proceeding pursuant to the Tax Injunction Act); *Garcia v. Ingram,* 729 F.2d 691 (10th Cir. 1984) (Title XX state administrative proceeding); *Ciechon v. City of Chicago,* 686 F.2d 511 (7th Cir. 1982) (municipal administrative proceeding preceding Section 1983 action); and *Lampher v. Zagel,* 755 F.2d 99 (7th Cir. 1985) (state court proceeding preceding Section 1983 action). These cases presented the very issue decided by this Court in *Webb* and fees for these proceedings are not authorized by Section 1988, except for time necessary to advance a related action or proceeding that is covered by Section 1988. *Webb,* 105 S.Ct. at 1925. The remaining two pre-*Webb* cases cited by petitioner involve Title VI federal administrative proceedings; *Latino Project, Inc. v. City of Camden,* 701 F.2d 262 (3rd Cir. 1983) (fees denied) and *N.A.A.C.P. v. Wilmington Medical Center, Inc.,* 689 F.2d 1161 (3rd Cir. 1982), *cert. denied,* 460 U.S. 1052, 103 S.Ct. 1499, 75 L.Ed2d 930 (1980) (fees allowed). While *Webb* did not specifically rule on the issue of whether attorney's

fees can be recovered for Title VI federal administrative proceedings, the reasoning of the *Webb* opinion undercuts the *Latino* decision and strongly supports the *N.A.A.C.P.* decision and the decision of the Court of Appeals in this case. The *Latino* court concluded that the word "proceeding" in Section 1988 referred only to court actions. 701 F.2d at 264. As noted above, this same argument was made to this Court in the *Webb* case and the Court declined to adopt it. In addition the approach, continued in *Webb,* of applying attorney's fees statutes as written supports the *N.A.A.C.P.* decision and the decision of the Court of Appeals below in that Section 1988 specifically provides for attorney's fees for "proceedings . . . to enforce . . . title VI . . . ."

In decisions handed down subsequent to *Webb* there is no conflict among the ruling regarding the application of Section 1988 to administrative proceedings: *Delaware Valley Citizens' Council v. Pennsylvania,* 762 F.2d 272 (3rd Cir. 1985) (fees allowed for work in administrative proceeding where work was useful and necessary to advance litigation under a fee statute); *Kuhns v. City of Commerce City,* 618 F. Supp. 1475 (D. Colo. 1985) (fees refused for state administrative proceeding not part of an action to enforce a statute ennumerated in Section 1988); and *Bennett v. Central Telephone Company of Illinois,* No. 79 C 5000, — F.Supp. —, (N.D. Ill. Sept. 30, 1985) (fees allowed for work in administrative action, where work was useful and necessary to advance Title VII claim in different action against same defendant). Thus, there simply is no conflict that requires resolution by this Court.

Even assuming, *arguendo,* that some conflict is unresolved regarding the application of Section 1988 to ad-

ministrative proceedings, such conflict would not justify the granting of certiorari in this case. As shown by the small number of cases applying *Webb* to this issue, there has not been sufficient time for the lower courts to apply *Webb* and review of the issue now by this Court would be premature and perhaps unnecessary.[18]

CONCLUSION

For the reasons explained above, respondents request that the Court deny the petition for writ of certiorari or, in the alternative, that the Court summarily affirm the decision below of the Court of Appeals.

Respectfully submitted,

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18. Petitioners also assert, without discussion of its application to their petition, that Section 1988 does not create an independent cause of action to recover attorney's fees. Petition, p. 8. In the case at bar there was, as the Court of Appeals noted, a court action, if one is needed to trigger Section 1988. 769 F.2d at —; Petitioners' Appendix at 20. Moreover, as both the district court and the Court of Appeals concluded such a court action is in fact not required. *id;* 598 F. Supp. at 262. In any event, petitioners' assertion provides no support for their petition.

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
NORTH CAROLINA
DURHAM DIVISION

No. C-352-D-72

ECOS, INC.; DREW DIEHL; ASSOCIATED STUDENTS OF DUKE UNIVERSITY; STEVE SCHEWEL and HENRY BECK, Members of Associated Students of Duke University; and JOHN ROBERTSON,

Plaintiffs

CREST STREET COMMUNITY COUNCIL, INC. and WILLIE PATTERSON,

Applicants for Intervention

v.

CLAUDE S. BRINEGAR, Secretary of United States Department of Transportation; T. J. MORAWSKI, Division Engineer, Federal Highway Administration; McLAUCHLIN D. FAIRCLOTH, Commissioner, North Carolina State Commission; W. F. CADDELL, JR., Planning and Research Engineer, North Carolina State Highway Commission; and NELLO TEER COMPANY, A Corporation,

Defendants.

CONSENT JUDGMENT

(Filed December 4, 1982)

1. Plaintiffs brought this action on December 18, 1971, seeking an injunction prohibiting further construction of the East-West Expressway in Durham, North Carolina, on grounds of alleged violations of the require-

ments for a public hearing under 23 U.S.C. § 128, as amended, of alleged failure to comply with Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. § 1653(f), and Section 138 of the Federal-Aid to Highway Act of 1968, 23 U.S.C. § 138 with respect to the use of lands protected thereunder, and of alleged failure to comply with Section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(a)(C).

2. The Durham East-West Expressway, if completed as proposed, will be a multi-lane controlled access highway which will extend from an interchange with existing Interstate 85 west of Durham easterly and southerly through the City to an interchange with the North-South Expressway and then northerly by way of the U.S.-70 Connector to an interchange with existing U.S. Highway 70 east of Durham, a total distance of 9.2 miles.

3. At the time of the institution of this action, a section of the expressway 1.7 miles in length lying between Chapel Hill Street and Alston Avenue had been completed and was open to traffic; another section 1.9 miles in length, lying between Alston Avenue and the North-South Expressway was under construction and almost complete; and another section 0.8 miles in length, lying between Chapel Hill Street and Erwin Road, was under construction by the defendant Nello L. Teer Company pursuant to a contract executed October 10, 1972.

4. On February 20, 1973, following a hearing on plaintiffs' motion for a preliminary injunction, the court denied relief as to the 0.8 mile section under construction but restrained and enjoined the defendants from taking any steps leading towards construction of the segment

lying between Erwin Road and the interchange at I-85 until compliance in full with the statutes alleged to have been violated and implementing regulations.

5. On November 8, 1973, the plaintiffs and the defendants, by consent judgment, settled their controversy as to the 0.8 mile segment under construction.

6. The North Carolina Department of Transportation, with federal assistance, now intends to construct a section of the expressway lying between Erwin Road and U. S. Highway 15-501.

7. The State defendants have filed a motion seeking dissolution of the injunction and dismissal of the action. The attorneys for the plaintiffs have filed responses to the State defendants' motion for dissolution of the injunction. Crest Street Community Council, Inc. and Willie Patterson, applicants for intervention, have filed a motion for intervention as plaintiffs in the action either as of right pursuant to Rule 24(a)(2) or by permission pursuant to Rule 24(b)(2).

8. The State defendants and the applicants for intervention have resolved the things and matters in controversy between them by agreement adopted by the North Carolina Board of Transportation on November 19, 1982. The plaintiffs and the applicants for intervention do not or no longer oppose the State defendants' motion to dissolve the injunction and do not wish to prosecute this action any further except that the applicants for intervention explicitly reserve the right to pursue all claims in their application for intervention in the event said agreement is not fully implemented, and in addition, reserve their claim for attorney fees against the

State defendants and the North Carolina Department of Transportation and the plaintiffs reserve their right to pursue all claims relating to the section of the expressway proposed to be constructed between U.S. Highway 15-501 and Interstate 85.

NOW, THEREFORE, without further proceedings, and upon consent of the parties, it is hereby ORDERED, ADJUDGED and DECREED:

1. That the injunction presently in force in this action is dissolved and is of no further force or effect;

2. All claims in this action are dismissed, and this dismissal is with prejudice for all claims except those explicitly reserved in Paragraph Eight above by applicants for intervention and plaintiffs.

3. That the plaintiffs and the defendants shall bear their own costs, including their own attorney fees.

This the 14 day of December, 1982.

/s/ Eugene A. Gordon
UNITED STATES DISTRICT
COURT JUDGE

WE CONSENT:

SMITH, PATTERSON, FOLLIN, CURTIS,
JAMES & HARKAVY

By /s/ Michael K. Curtis
Attorney for Plaintiffs

/s/ Wilbur Gulley
Attorney for Plaintiff Steve Schewel

A True Copy

Attest:

Carman J. Stuart, Clerk
Clery Shepherd
Deputy Clerk

NORTH CENTRAL LEGAL
ASSISTANCE PROGRAM

By /s/ Michael D. Calhoun
Attorney for Applicants for Intervention
RUFUS L. EDMISTEN
Attorney General

By /s/ James B. Richmond
Special Deputy Attorney General
Attorney for State Defendants

By /s/ Benjamin H. White, Jr.
Assistant United States Attorney
Attorney for the Federal Defendants

By /s/ R. Roy Mitchell, Jr.
Attorney for the Defendant Nello Teer Company

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1008

(Filed September 9, 1985)

Crest Street Community Council, Inc.,
et al,

Appellants,

versus

North Carolina Department of
Transportation, et al,

Appellees.

Appeal from the United States District Court for the Middle District of North Carolina, at Durham. Hiram H. Ward, District Judge.

Upon consideration of the motion of the appellees for a stay of mandate pending application to the Supreme Court of the United States for a writ of certiorari;

IT IS ORDERED that the recall and stay of the mandate is hereby denied.

For the Court—By Direction
JOHN M. GREACEN
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
NORTH CALONINA
DURHAM DIVISION

File No. C-83-1239-D

CREST STREET COMMUNITY COUNCIL, INC.
et al,

Plaintiffs,

v.

NORTH CARLOINA DEPARTMENT OF TRANSPORTATION, NORTH CAROLINA BOARD OF TRANSPORTATION, and WILLIAM R. ROBERSON, as Secretary of the North Carolina Department of Transportation and Chairman of the North Carolina Board of Transportation,

Defendants.

DEFENDANTS' MOTION
TO DISMISS THE ACTION

(Filed August 8, 1984)

The defendants North Carolina Department of Transportation, North Carolina Board of Transportation and William R. Roberson, as Secretary of the North Carolina Department of Transportation and Chairman of the North Carolina Board of Transportation, by and through their attorney, respectfully move the Court pursuant to Rules 12(b) and 12(c) of the Rules of Civil Procedure for an order dismissing this action on the following grounds:

(1) The Court lacks jurisdiction over the subject matter of the action and over the person of the defendants.

(2) In essence this is an action against the State of North Carolina, which has not consented to suit nor

otherwise waived its sovereign immunity or its immunity from suit under the Eleventh Amendment to the Constitution of the United States.

(3) The Complaint fails to state a claim upon which relief can be granted.

(4) The plaintiffs lack standing to bring and maintain this action.

(5) The plaintiffs have failed to pursue and exhaust their administrative remedies.

The grounds for this motion are more fully set forth in the defendants' accompanying brief.

This the 8th day of August, 1984.

RUFUS L. EDMISTEN
Attorney General

/s/ James B. Richmond
Special Deputy Attorney General
N. C. Department of Justice
P. O. Box 25201
Raleigh, North Carolina 27611
Telephone: 919-733-4185

Attorney for Defendants